Between Killing and Letting Die in Criminal Law

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Introduction

The distinction between act and omission is deeply embedded in our legal thinking. Criminal law makes a significant distinction between harmful actions and harmful omissions and, consequently, between killing and letting die. Any act that causes death (strangulation, gun shot, etc.) is grounds for a conviction of manslaughter -- subject, of course, to the existence of the other elements necessary for establishing criminal liability, such as causation and *mens rea*. However, liability for death by omission is subject to the additional identification of a duty to act. In other words, the defendant will be liable only if we can identify such a duty and show that the breach of this duty resulted in the victim’s death. This distinction is further reflected in the proposed Model Penal Code, which states in section 2.01(3)(b) that liability for an offense may not be based on an omission unless a duty to perform the omitted act is otherwise imposed by law.¹

The distinction between act and omission is not made solely under criminal law as it is rooted in the foundations of common morality, which emphasizes not only the results but also the conduct that produced those results. Intuitively, John drowning Joe is morally very different from John not rescuing Joe from drowning. Similarly, active euthanasia (injecting poison into a terminal patient) is not morally the same as passive euthanasia (not connecting the patient to ventilation equipment).

Nevertheless, since the beginning of the 1960s, there has been a significant movement to attack and criticize the moral distinction between killing and letting die.² The primary question is whether there is, in fact, a moral distinction between causing harm and letting harm happen; more specifically, is there such a distinction between killing and letting die? Furthermore, if, in fact, one can make such a moral distinction, what is the moral rationale behind it? According to these critics, when the two scenarios are otherwise equal in all respects -- that is, the intent, the

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¹The distinction between act and omission is reflected in all modern legal systems.
expense of preventing death, and the result are all the same in both cases, there is no moral ground for drawing a distinction between killing and letting die. Obviously, this is a morally radical position that demands a significant change in perspective, moral and perhaps also legal, since if the moral distinction between act and omission is not obvious, the legal distinction cannot be clear-cut either. This lack of clarity has led to many attempts at laying a logical foundation for the intuitive understanding that there is a moral and legal distinction between act and omission, and specifically between killing and letting die; yet it seems that creating this clear distinction is easier said than done.\(^3\)

The objective of this article, then, is to answer two interconnected and highly material questions that are fundamental to the analysis of this distinction from a criminal law perspective.

**First,** what is the rationale for distinguishing between act and omission under criminal law? In this context, we must examine why the distinction between act and omission disappears when there is a duty to act (the “rationale question”). Within the rationale question, my primary focus will be on result crimes, as opposed to conduct crimes, concentrating on the distinction between killing and letting die since that is the primary example used in philosophical and legal discourse to elucidate the distinction between act and omission.

**Second,** what is the definition of act and omission under criminal law? More specifically, what are the respective definitions of killing and letting die (the “definition question”)?

The rationale question is highly relevant in today’s climate as it impacts a broad spectrum of contested issues in criminal law, such as whether act and omission should be treated differently as punishable offenses (even when we can identify a duty to act) and which duties should serve as a basis for conviction in result crimes. I will discuss this issue in a subsequent article.

The rationale question presented in this article must be distinguished from the question of the validity of a “Good Samaritan” law (a duty to rescue). “Good Samaritan” laws beg the question in that they assume a moral distinction between A killing B and A not rescuing B (assuming that A and B are strangers); the question in these cases is whether not saving another person should be considered a crime. My rationale question is more radical as it asks why there is a difference between the elements necessary for liability in cases of act and omission. Why not convict a person of manslaughter if he could have prevented the death of another and failed to do so? This question does not assume any difference between act and omission; rather, it challenges the very basis for making such an assumption.

This article surveys and critiques several important theories for the distinction between act and omission. The article is structured as follows: Chapter 1 presents the liberty theory. Chapter 2

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\(^3\) For example, Honore’ states, “My reason for discussing the acts and omissions doctrine is that, though law is strongly committed to it, lawyers have not been very successful in finding a rationale for it.” TONY HONORE’, RESPONSIBILITY AND FAULT 41(1999).
discusses the theory of causation, particularly as it is proposed by Moore. Chapter 3, discusses the risk creation theory. Chapter 4 introduces the coordination theory as presented by Feinberg. Each chapter relates to both, the rationale question and the definition that arises from this rationale and also presents various criticisms of each of the rationales and definitions.

In Chapter 5, I introduce a new theory for the distinction between act and omission. This theory is based on the difference between the protected values that are foundational to the prohibitions against killing and letting die. In this context, I contend that this distinction goes hand-in-hand with the Hobbesian and Rawlsian theories of social contract and with general theories of rule utilitarianism. I then demonstrate how my theory is distinct from those presented in the previous chapters. Finally, I introduce a new and different definition for killing and letting die and address potential criticism of my theory.

In my opinion, clarifying the distinction between act and omission may not only contribute to academic discourse in the field of criminal law but also broaden the spectrum of considerations available to the courts in the relatively frequent cases that come before them that relate to this issue.
1. **The Liberty Theory**

Legal liability for omission is contingent upon identifying a duty to act; liability for an act is not. Therefore, for the purposes of conviction for an act resulting in the victim’s death, any death-causing act will constitute *actus reus*, while conviction for omission requires a duty to act. This distinction is not overtly obvious as multiple theories of morality hold that all else being equal (intent, expense and result), there is no justification for distinguishing between act and omission. James Rachels, a prominent theorist belonging to this school of thought, suggests that there is no moral distinction between a person who drowns his six-year-old nephew in order to claim the boy’s inheritance and a person who does not rescue the boy from drowning (assuming such a rescue was reasonably possible).\(^4\)

A. **The Rationale**

What, then, is the rationale behind the criminal law distinction between act and omission? One of the principal theories behind this distinction is rooted in the value of personal liberty.\(^5\) According to this theory, the prohibition against a harmful act does not cause significant loss of personal liberty since all that is required of a person is to refrain from acting. However, a prohibition against a harmful omission does cause significant loss of liberty since it requires the individual to stop whatever she is doing in order to prevent harm from befalling another person. If people were liable for omission even in the absence of a specific duty to act, they would be forced to drop everything and act at a moment’s notice, at any time. Since the legal system must allow people to maintain a routine without being forced to stop and go out on random rescue missions, criminal law maintains that liability for omission exists only if a duty to act can be specifically identified.\(^6\)

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\(^6\) Kugler, *supra* note 5, at 214 and Simester & Sullivan, *supra* note 5. A different rationale is sometimes presented in the context of the liberty theory. Some contend that criminal law limits crimes of omission as they restrict personal liberty more than classifying particular acts as criminal. The contention is that prohibiting omission allows an individual to perform a particular act, but it prevents him from doing multiple other ones. However, prohibiting a particular act limits only that act itself and does not prevent the performance of multiple other ones. Critics of this theory contend that it is inaccurate to state that criminalizing omission causes more loss of liberty than crimes of action. The issue of loss of personal liberty relates to the person who is the object of the crime and to his preferences. For example, the prohibition against smoking does not affect a person who has no interest in smoking, but it severely affects a person who is a chain smoker. The fact that the latter can sing or dance instead of smoking does not prevent the loss of personal liberty. See G. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1450-51 (1994). In contrast, the consideration mentioned in the text provides that with respect to result crimes (generally absent defined conduct), the need to act is frequent and recurring and therefore results in a loss of personal liberty.
In this vein, let us assume that John, who lives in Joe’s neighborhood, is faced with life-threatening danger. Joe knows this. If Joe were liable even without having a duty to act, he would be forced to drop everything in order to help John since not doing so would risk liability for voluntary and negligent manslaughter.

In cases of omission, then, the purpose of requiring a duty to act is to limit the number of scenarios in which an individual must act to prevent harm from befalling others. This limits the individual’s loss of liberty and allows him to maintain his normal routine, with minimal interference.\(^7\)

It is worth pointing out that the liberty theory is not proprietary to criminal law and is utilized with regard to the moral question of whether killing is worse than letting die. Trammel, for example, states the following:

> Suppose we teach that the duty to save applies at all times and to all people, that whatever one may be doing one should stop doing that if it prevents one from saving someone, even if it takes great effort and results in serious personal sacrifice, the only exception being that we are free not to save someone else if this is the only way we can save ourselves...if the duty to save is solemnized to the same degree that the duty not to kill is, the moral agent either will lead the life of a John the Baptist or else will become demoralized ...or else will be a miserable human being.\(^8\)

**B. Legal Definitions**

According to the liberty theory, the accepted test for defining act and omission is bodily movement. By this test, a muscle twitch that causes harm is classified as an act, while the lack of such a movement is classified as omission.\(^9\) More specifically, a muscle twitch that causes death is classified as a killing, while the lack of such a movement is classified as a letting die.

The bodily movement test fits with the liberty theory: a prohibition against an act (a bodily movement) does not cause significant loss of liberty since the protagonist maintains multiple other avenues of action. On the other hand, a prohibition against omission, which is classified as non-action, does in fact cause loss of liberty as such a prohibition requires the individual to perform certain acts, which, when they recur on a regular or semi-regular basis, prevent her from maintaining a regular routine. If a person is subject to a general obligation to prevent harm, then each time that she becomes aware of a possibly harmful event, she must act to prevent it.

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7 Kugler, *supra* note 5, at 212.
9 Simester and Sullivan, *supra* note 5, at 70.
Since a person cannot be in two places, or do two things, at once, she must almost always abandon her routine in order to prevent the harmful event. When such events occur relatively frequently, a person becomes hard-pressed to maintain a normal lifestyle. However, a prohibition against actively causing a certain outcome is different. When one is faced with the option to actively cause a prohibited result, and is forced to choose an alternative mode of action, the fact that a choice is involved means that the loss of liberty is minimal.\textsuperscript{10}

In order to complete the picture, it should be noted that the issue of classification as act or omission is independent of the manner in which the act is “expressed.” For example, in a case in which a father does not feed his son for a certain period of time, and this leads to the son’s death, we would say that the father starved his son. The word “starved” implies an act. Nevertheless, since starving the son did not actually require any act at all, this is in fact an omission. Therefore, the father is liable only because in this particular case there is a duty to act, and not because starving his son is considered an act.\textsuperscript{11}

C. Criticism

The liberty theory has several aspects that make it imperfect for our purposes:

First, the liberty theory is more relevant to crimes of recklessness or negligence. If omission in these crimes did not require a duty to act, people would be liable in any event in which they did not assist someone in need. These events are relatively frequent (as we require real or potential knowledge of the elements of the crime), and creating liability for them would cause severe loss of liberty. However, in cases that require intent, this issue is almost nonexistent since liability does not arise unless the person \textbf{intended} for the prohibited result to take place (and cases such as these are, by nature, limited in number). Since criminal law distinguishes between act and omission without considering \textit{mens rea}, it follows that this distinction cannot be founded on the liberty theory alone.\textsuperscript{12}

\textsuperscript{10} Kugler, \textit{supra} note 5, at 233-34.
\textsuperscript{11} \textit{Id.} at 228-29.
\textsuperscript{12} In addition, if the liberty theory \textbf{stood alone}, then, theoretically, in certain situations a person would be permitted to kill one other person in order to save five other people. In other words, according to the liberty theory, the need to identify a duty to act in a case of letting die stems from the lawmaker’s desire to limit loss of personal liberty, as opposed to the prohibition against killing that does not cause significant loss of such liberty. Thus, the requirement to identify a duty to act in case of omission comes to \textbf{protect the individual} so that he may maintain a normal life without having to continuously rescue or assist others. However, if this is true, then in a case in which the individual is willing to waive his right to liberty in order to save others (and this is, in fact, a waiver of his liberties since the basic assumption is that an active rescue causes greater loss of liberty than letting die), he would theoretically be permitted to kill one person if that meant saving five others since in this instance there should not be a fundamental difference between killing (killing one person) and letting die (not saving five people).

One could answer this critique by stating that under no circumstances would an individual be permitted to kill one person in order to save five others since doing so transforms a human being into a means toward an end. Nevertheless, it is not difficult to suggest other scenarios in which a person is not used as a means and yet it is still prohibited to kill one person in order to save five others. For example, see Philippa Foot, \textit{The Problem of Abortion}
Furthermore, following the liberty theory alone would, theoretically, lead to the conclusion that a person should not be convicted of manslaughter in situations where her liberty would be lost if she refrained from **active killing**. Thus, if abstaining from killing would cause loss of liberty or negatively affect one’s ability to make a living, then, according to the liberty theory, it would be incorrect to convict of manslaughter since in this particular scenario the prohibition against killing causes significant loss of liberty.\textsuperscript{13} In this instance, the individual’s obligation not to kill should be less absolute. Legally, however, this is obviously not the case. The legal obligation not to kill a person actively does not become less acute in proportion to the individual’s loss of personal liberty.

In response to this criticism, one could suggest that, for the sake of clarity, the law cannot create highly specific distinctions between certain scenarios. For the purposes of the present argument, this means that although there are scenarios in which the prohibition against killing does cause loss of liberty, because this is the exception and not the rule, criminal law cannot make a distinction based on this criterion.

This position is somewhat problematic, however, since it suggests that scenarios could be created in which there is no moral distinction between killing and letting die (when both cause loss of liberty), and yet criminal law will still punish killing more severely than letting die.

A second criticism of the liberty theory relates to the notion that the distinction between act and omission, or between killing and letting die, depends on the varying levels of loss of personal liberty. Honore’ suggests that if the entire difference between act and omission were dependent upon the impact on personal liberty, we could not make the clear distinction, legal and moral, between John drowning Joe and John watching Joe drown. According to Honore’, even if the prohibition against killing causes less loss of liberty than the prohibition against letting die, there is not a fundamental difference between the two cases.

If it turns out that, apart from considerations of cost, not contributing to the relief fund is morally just as bad, or almost as bad, as poisoning the relief food, we shall have to ask whether law and conventional morality are justified in making so sharp a distinction between acts and omissions on the basis of cost alone.\textsuperscript{14}

In response to this criticism, one might suggest a slight modification of the liberty theory presented here. In a liberal democracy, citizens are bound by the principle that law enforcement requires substantiation. In other words, we must resist enforcing the law unless we have a

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\textsuperscript{13} See KAGAN, supra note 2, at 92-94.

\textsuperscript{14} HONORE’, supra note 3, at 52-53.
convincing basis for doing so. This idea, from a criminal law perspective, is rooted in the concept that a criminal prohibition causes loss of personal liberty and must therefore be justified. This is true whether we adopt the theory that an act of free will has intrinsic value or whether we assume that an act of free will has the power to reveal things inherently valuable to society at large. This idea affects the criminal law distinction between act and omission. With respect to prohibitions against certain acts, the events requiring intervention are generally under the control of the person herself since she can decide not to create the prohibited condition (John can choose not to shoot Joe). On the other hand, when dealing with a duty to act (such as John’s duty to rescue Joe from drowning), the event requiring intervention is imposed upon the individual since it is independently created (Joe’s drowning was not created by John; rather it was imposed upon him). For this reason, it is possible to propose that a prohibited omission causes a greater loss of liberty than a prohibited act.

In my view, this suggestion is also somewhat difficult. First, when considering such higher values as human life or bodily integrity, the “leveling” of loss of personal liberty does not seem to justify such a clear distinction between act and omission. From a personal liberty perspective (when the protected value is human life), is there truly a difference between John drowning his six-year-old nephew and not rescuing his nephew, all else being equal?

Second, an act is still prohibited even when a person is not in full control of the prohibited situation. The umbrella of a prohibited act covers scenarios in which a person is obligated to remain passive, and in such scenarios, the effect on personal liberty is just as great as in cases of prohibited omission (nevertheless, the distinction between act and omission remains). To illustrate this point, imagine John is driving his car and Joe suddenly jumps into the street. Obviously, if John has the time and ability to swerve to avoid hitting Joe, he must do so. John could not claim in his defense that he lacked control over the beginnings of the developing situation.

The bodily movement test also does not completely lend itself to distinguishing between act and omission. Theoretically, conviction in cases involving bodily movement may still require a duty to act.

Consider the following two cases:

“Movement” – John shoots at Joe and Joe dodges the bullet. The bullet hits Jane and kills her (for the sake of this argument, we assume that Joe was wearing body armor and would not have been injured anyway).

According to the bodily movement test, Joe’s movement would be classified as killing since it caused Jane’s death. Nevertheless, his act is seemingly more accurately defined as a letting die,
and, therefore, Joe would be liable only if we could identify a duty to stand in one place and not move.

“Freezing to death” – Joe is about to freeze to death. In order to survive, he tries to enter John’s house. John blocks Joe by locking the door. Joe dies.

Even if we assume that Joe would have survived if John had not locked his door, there appear to be no grounds for convicting John of manslaughter. This scenario is no different from any other case of no rescue, but it is not similar to manslaughter.

2. The Causality Theory

A. The Rationale

Several scholars suggest that the criminal law distinction between act and omission is not related to the individual’s freedom to act, but rather to causality. When John drowns Joe, it is fair to say that John caused Joe’s death since there is a cause and effect relationship between John’s action and Joe’s death. If John does not prevent Joe’s death, it is fair to say that there is no causal relationship between John’s inaction and Joe’s death (or at least that the causation is indirect).

Moore, who theorizes a distinction between act and omission based on causality, hones this distinction and suggests that an act has the potential to create change in the world, sometimes of a harmful nature, and thus worsen the victim’s condition. Inaction, or omission, however, does not create any change in the world; therefore, it cannot negatively affect the victim’s state of being. At most, omission will leave the victim in the same condition as he was in previously.

Omissions do not cause anything. Then when I omit to prevent some harm I do not make the world worse … only when I cause that harm to occur – through my actions – do I worsen the world.16

Moore is not suggesting that omission should never be punishable. In fact, he distinguishes between two types of omission: omission that is a breach of a strong positive duty (rooted in the connection between the agent and the harmful source, or between the agent and the victim) and omission that is a breach of a weak positive duty (not rooted in either link).17

An example of a strong positive duty is a father’s duty to save his son. In such cases, even though not rescuing the victim did not worsen his condition (according to Moore), omission is still punishable as the duty is rooted in the connection between the agent and the victim.

17 Id. at 54-57.
An example of a weak positive duty is the duty to rescue a stranger. According to Moore since an omission does not worsen the victim’s condition, a weak positive duty should not be punishable since enforcement would result in loss of liberty.\(^{18}\) The liberty theory, then, helps explain why omission in the case of a weak positive duty should go unpunished. However, it does not explain the basic difference between act and omission. According to Moore, this distinction is rooted in the premise that acts worsen the victim’s condition, while omissions do not.\(^{19}\)

While the liberty theory requires identifying a duty to act in order to limit loss of liberty in omission, Moore theorizes that a duty to act is necessary to replace the causal connection between omission and harm. When a doctor does not provide a patient with insulin and the patient dies, the doctor will be convicted of manslaughter (subject to obligatory \textit{mens rea}), not because of a causal connection between the doctor’s passivity and the patient’s death, but because the doctor breached his duty to act. Moore, however, does not suggest that the duty to act creates a causal connection in omission as lack of causation cannot be rectified by identifying a duty.\(^{20}\) Thus, according to Moore, in cases of omission there is no true causation, but rather a form of causal explanation that had the individual fulfilled her duty, the harm would have been prevented.\(^{21}\)

\textbf{B. Legal Definitions}

Moore’s definition of act and omission is also based on the bodily movement test. According to Moore, an act is defined as the agent’s willful bodily movement, while an omission is the absence of such a movement. Killing, then, is defined as the agent’s movement that causes the victim’s death, while letting die is death caused by the agent’s passivity, thus making liability contingent on the identification of a duty to act.\(^{22}\)

The legal definition based on the bodily movement test flows logically from the theory of causality. According to this theory, a bodily movement causes change and therefore can also cause harm, thus worsening the victim’s condition, while lack of movement does not cause change and therefore no harm or worsening of the victim’s condition is created.

Omissions are simply absent actions. An omission to save life is not some kind of ghostly act of saving life, and certainly not some ghostly kind of killing. It is

\(^{18}\) The liberty theory was presented above.

\(^{19}\) \textsc{Moore}, supra note 16, at 57.


\(^{21}\) \textit{Id.}

\(^{22}\) \textit{Id.} at 1785-87.
literally nothing at all … actions are event particulars of a certain kind, namely, willed bodily movements.\textsuperscript{23}

C. Criticism

The causation theory is also not without its flaws. First, it is not at all clear that from a mechanical-scientific perspective omission cannot cause a result. If we define causation using the “but for” test, as in “but for the defendant’s act, would the harm have occurred,” then, at least theoretically, there is no difference between an act that causes harm and an omission with equal results. According to this test, A caused C when C’s occurrence is dependent upon A. Theoretically, just as we suggest that, for example, John’s shot constitutes a definitive cause for Joe’s death (Joe would not have died without John having pulled the trigger), we can also suggest that John’s inaction in rescuing Joe caused Joe to die (if John had thrown Joe the life jacket, he would have survived). Some suggest that omission cannot cause harm since the causality factor must consist of events that actually took place in the physical world, and therefore omission cannot be the scientific cause of a result.\textsuperscript{24} However, others argue that the components of causality (cause and effect) need not be events, but facts. Since an omission is defined as a fact, it too can cause an effect.

Mellor, for example, proves his point from (among other things) negative events. He suggests that if one can claim that John’s fall caused his death, one can also claim that John’s lack of falling caused him not to die.\textsuperscript{25} Thus, omissions, just as acts, can cause effects.

Bennett, who dealt directly with the causal distinction between killing and letting die, also takes the approach that inaction can constitute cause. Regarding a case in which the agent did not move a rock in order to save the victim (“stayback”), he states:

My account of causation makes it impressively weak. It implies that in Stayback the causes of the vehicle’s demise include its momentum, the slope of the ground, the presence of the cliff, the stillness of the ground, and the agent’s not moving in a certain way. That is the crux: agent’s not interposing the rock is a cause of the vehicle’s destruction: so the causal analysis of our distinction fails.\textsuperscript{26}

\textsuperscript{23} \textit{Moore, supra} note 16, at 28-29.

\textsuperscript{24} For the opinion that there is no causation in omission, see Helen Beebee, \textit{Causing and Nothingness, in CAUSATION AND COUNTERFACTUALS} 291 (John Collins et al. ed., 2004). The definition of an “event” also serves to cloud the concept of causation. In my opinion, the logical definition of an event is presented by Mellor: “The difference between events and things … is this. Every particular that is extended in space, whether it is a thing or an event, has spatial parts. An omelette, for example, which is a thing, obviously has spatial parts. And so does a family meal, which is an event … but not every particular that is extended in time has temporal parts. Events do … but things do not.” D.H. Mellor, \textit{The Facts of Causation} 122 (1995).

\textsuperscript{25} \textit{Id}. at 132.

\textsuperscript{26} \textit{Jonathan Bennett}, \textit{The Act Itself} 129-30 (1995). See also Smith, who states that it is mistaken to suggest that inaction cannot cause an effect: “Mere absence has effects. A play can be ruined if no audience attends. A political
Second, even if omission cannot cause a mechanical or scientific effect, it can still cause a legal one. As opposed to scientific causation, legal causation is necessary in order to impose liability on a guilty party. Here, the key issue is not whether mechanical or scientific causation actually exists, but rather whether this party’s actions or inactions played a primary role in achieving the effect. The initial test for such an assertion is the “but for” test, and, as mentioned above, in this respect act and omission each potentially fulfill the requirements of the test.27

Third, with regard to Moore’s approach, even if we agree that there is a significant difference between worsening the victim’s condition and not improving it, it is still unclear why not preventing harm does not worsen the victim’s condition. If John does not rescue a baby from drowning, is he not worsening the baby’s condition? It is obvious that if we agree that in such cases John is causing the baby’s condition to worsen, Moore’s distinction between act and omission collapses.28

Fourth, even if inaction cannot cause an effect, it is completely unclear whether Moore’s causal distinction is morally justifiable. Feinberg’s distinction between two types of “benefit” is particularly helpful in this regard.29 The first type of “benefit” improves a person’s standard condition, such as giving someone a present. This action elevates the person above her normal condition.30 The second type of “benefit” elevates a person to her normal condition. For example, rescuing a drowning baby restores her to her condition prior to falling into the water. Feinberg asserts that although both scenarios involve certain benefits, these benefits are morally very different. A person does not have a right to receive the first type of benefit, or to have her condition elevated above what is her “normal,” but she does have a right to receive the second type, or to have her condition restored to her “normal.” I suggest that Moore’s distinction is correct with respect to a benefit of the first type. In other words, there is a moral distinction between worsening and not improving the victim’s condition, when improving means elevating

27 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 447 (2003), Simester and Sullivan, supra note 5, at 92-93.
28 See also Simester and Sullivan, supra note 5, at 322: “conversely, might not noninterventions often be said to make things worse or create a risk that they will be worse? Peter’s lot is worsened, and the risk of his drowning increases ... by my nonintervention.”
30 Defining a person’s normal condition is difficult. For example, if my friend loses $10,000 in a business deal, am I obligated to return him to his prior condition? Does it matter how he lost the money? What if my friend had $10,000 stolen from him? Must I return him to his condition prior to the theft? In this article I assume that a person’s normal condition is one in which he can function without assistance. This definition is obviously non-exhaustive, but I think it is sufficient in order to distinguish between the two types of benefit.
the victim above what is her “normal.” However, it is not at all clear that there is any distinction between worsening and not improving the victim’s condition, when improving means restoring the victim to her “normal.” What is the difference between causing a person to be in condition X (when X is below normal) and not elevating her back above condition X? 

Fifth, the criticism of the causality theory’s definitions of act and omission is fundamentally similar to the one presented above regarding the liberty theory. In other words, there are scenarios that involve bodily movement that cannot be categorized as killing and therefore require identification of a duty to act.

31 I note that with respect to result crimes whose purpose is to prevent harm, the duty is only to restore the victim to his normal condition.
3. **The Risk Creation Theory**

**A. The Rationale**

A third reason for making a distinction between act and omission is based on the difference between creating and not preventing risk. According to this theory, the primary issue is whether the agent created, or caused, the risk that led to the harmful outcome or just allowed it to take place. In other words, the question is: Did the agent interfere with the victim’s natural state of being? According to the risk creation approach, although both act and omission may contain a causal link (since, as mentioned previously, if John had thrown the life jacket, Joe would have been alive), it is still necessary to distinguish between them.

Risk creation theorizes that when John shot and killed Joe, John created the risk that caused Joe’s death since by pulling the trigger John altered the natural state in which Joe would have continued to live. However, by not throwing the life jacket, John did not create the risk of drowning; he only failed to prevent it from taking effect and, thus, did not interfere with Joe’s natural state of being.

The moral justification for distinguishing between risk creation and non-prevention is based on the assumption that creating a risk is more blameworthy than merely allowing it to take effect.

This distinction also explains the need for a duty to act in result crimes. Liability for omission is necessarily contingent upon the breach of a specific duty because of the relative “weakness” of omission. In cases of omission the protagonist does not create the risk, and therefore liability requires breach of a specific duty.

**B. Legal Definitions**

As opposed to the two previous theories, the risk creation theory does not use the bodily movement test. According to the risk creation theory, a bodily movement may still be defined as an omission (letting die), and a lack of movement can be defined as an act (killing). The relevant question is whether the agent created the risk or just failed to prevent it. McMahan demonstrates this distinction through the following cases:

“**Dutch boy 1**” – a Dutch boy sees a dike that is beginning to break, threatening to flood the town. The boy plugs the hole with his finger and prevents the dike from breaking. After several hours the boy tires and returns home. As a result, the dike bursts and the town is flooded.

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“Dutch boy 2” – a Dutch boy sees a dike that is beginning to break, threatening to flood the town. The boy plugs the hole with his finger and prevents the dike from breaking. After several hours the boy’s father arrives and takes him home. As a result, the dike bursts and the town is flooded.34

In both scenarios, a bodily movement causes the town to be flooded, but according to the risk creation theory the cases are not the same. According to McMahan, the child’s act in “Dutch boy 1” is a letting die, while the father’s act in “Dutch boy 2” is a killing. This is because removing the finger from the dike in “Dutch boy 1” does not create a new risk since the person who removed the defense is the same as the one who placed it. The boy placed the finger and then removed it himself. Therefore we don’t blame the result on the boy’s intervention. Removing the finger simply returns things to their prior condition.

In “Dutch boy 2,” however, the father removing the boy’s finger created a new risk since the defense was removed by someone other than the person who placed it. In this scenario, the town would have been saved absent the father’s intervention. The father’s intervention, then, is tantamount to the creation of an initial risk that ultimately caused the people of the town to be killed, and therefore it is classified as a killing.35

In most cases, in order to assess whether the agent created the risk or not, we must ask the following question: What would have happened if the agent had not existed at all?36 When John shoots and kills Joe, if John had not existed, then Joe would still be alive. John interfered with the natural order, and his act is classified as a killing. On the other hand, when John does not rescue Joe, then Joe would have died even if John had not been around, and, therefore, John’s inaction did not create the risk and is classified as a letting die. This is true regarding the Dutch boy scenarios as well. In “Dutch boy 1,” if the boy had not been there, the town’s inhabitants would have been killed by the flood. Thus, the boy did not create the risk. However, in “Dutch boy 2,” if the father had not been there, the boy would have saved the town’s inhabitants; therefore, the father is responsible for creating the risk that caused their death.37

35 Bennett, quoting Alan Dongan, made a similar distinction. Dongan claims that there is a distinction between killing and letting die as killing involves interference in the natural order of things, while letting die does not. BENNETT, supra note 26, at 105-18.
36 For a similar position utilizing this question to distinguish between act and omission, see KATZ, supra note 32, at 145.
37 Nonetheless, according to McMahan, there are scenarios in which the person who reinstated the risk is also the one who initially prevented it, and yet the reinstatement of the risk is still classified as a killing. For example, in the case of “The Pipe Sealer,” a factory had a gas leak that threatened to kill many of the factory’s workers. One of the workers fixed the leak and saved his coworkers. A year later, the same worker reopened the same leak, and many workers were killed. This scenario is classified by McMahan as a killing even though the person who prevented the leak is also the one who caused it. This is because we must not only consider the identity of the agent, but also the type of protection or assistance he provided. The question is, was the defense perfect, or did it require something
C. Criticism

This theory, too, has several difficulties. First, it is not clear that a person who creates harm is more guilty or responsible than a person who does not prevent it. Theoretically, there is a moral obligation to prevent the harm regardless of how the risk was created. Morally, there is no difference between an agent who drowns a victim and an agent who does not rescue a victim as in both cases the agent could have prevented the harmful result. Thus, one may claim that the agent who did not rescue the victim when he had the chance and capability to do so actually allowed the harmful result to take effect, and therefore the two cases are not legally distinct.  

Second, the risk creation theory does not explain the distinction between the following two cases:

“Freezing to death 1” (as described above) - Joe is about to freeze to death in the middle of the desert. Suddenly, he sees John’s house. John is not interested in letting Joe enter the house (he is not afraid; he just does not want Joe to enter). John locks the door and Joe dies.

“Freezing to death 2” – same as “freezing to death 1”, only in this case, Joe is trying to enter his own house. John, who is in Joe’s house, locks the door and Joe dies.

The difference between the two scenarios is that in “freezing to death 1” the house belongs to John, while in “freezing to death 2” the house belongs to Joe. Since the two scenarios are otherwise identical, the acts themselves cannot be distinguished by risk creation. Nonetheless, legally they are distinct. In “freezing to death 1,” John did not rescue Joe and, therefore, is guilty of letting Joe die, thus requiring identification of a duty to act in order to create liability. However, in “freezing to death 2,” since the house belonged to Joe, the scenario should be classified as a killing. This conundrum leads us to explore additional rationales for the distinction between act and omission.

more? In the “The Pipe Sealer” case, besides fixing the leak, no other act or intervention was necessary in order to remove the risk, and therefore the case is a killing. See JEFF McMahan, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 381 (2002). For additional positions that use causality to distinguish between killing and letting die, see O.H. Green, KILLING AND LETTING DIE, 17 AM. PHIL. Q. 195 (1980) and Mathew Hanser, Why are Killing and Letting Die Wrong?, 24 PPA 175 (1995).

FEINBERG, supra note 29, at 174-75. See also Tooley, supra note 2, at 104. and Smith, supra note 26, at 87.
4. The Coordination Problem Theory

A. The Rationale

The last two theories presented have based the distinction between act and omission on moral principles, causation, and risk creation. However, one could suggest that the distinction between act and omission is not moral at all, but purely of a legal nature. According to Feinberg, John drowning Joe and John not rescuing Joe are morally equivalent as causation exists in both scenarios. Moreover, even if we could make a causal distinction between act and omission, it may be morally hollow since in both scenarios it was possible to prevent the harm, and harm prevention is the primary moral consideration. Feinberg is aware that in certain situations, such as when significant expense or effort is necessary to prevent the harm, it is possible to draw a moral distinction between the cases. However, Feinberg asserts that the distinction is not rooted in moral considerations, but rather in the legal issue of coordination (the coordination problem). The coordination problem exists when there is a general civic duty to help a person in distress. The coordination problem can be divided into two, the efficiency problem and the justice problem.

The efficiency problem stems from a general duty to rescue. If every person were obligated to rescue others, it is possible that there would ultimately be some people who were rescued and others who were not. The lack of coordination between people (who is charged with doing what when) would lead to catastrophic inefficiency in allocation of rescue resources, eventually resulting in waste. It is therefore preferable for society clearly to define efficient rescue roles, allowing the government to allocate these rescue resources as necessary.

The justice problem also stems from a general duty to rescue. If such a duty existed, society would find that certain people invested more effort in rescue missions than others. This problem is also solved by the government being responsible for allocation of rescue resources as necessary.

According to Feinberg, the creation of a general prohibition against a certain act, such as the prohibition against killing, does not create a coordination problem. Generally speaking, a person can adhere to the directive not to kill as this does not usually involve means or cost. On the other hand, when the issue is a general directive to save lives, a person cannot rescue all of the at-risk populations in the world, and not even the entire at-risk population of her own country or community. The result, then, is the coordination problem, demanding communication and cooperation between people.

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39 Feinberg, supra note 29, at 166-67.
40 Id.
41 Id. at 169.
42 Id.
43 Id. at 169-171.
Therefore, says Feinberg, in case of a sudden and unforeseeable duty to rescue, the individual is obligated to rescue the person in need. This duty is no different from the prohibition against killing, as in this instance, allocation of funds by the government would not have been useful.\(^4\)

However, in case of a foreseeable need to rescue, such as with destitute people who may die of hunger, or of a dangerous situation that commonly results in death, the duty to rescue rests with the government. This is not because the duty is not important, but rather because of the coordination problem.

It would be unfair to those who attempt to do so on their own if others do not make similar efforts and utterly chaotic if everyone tried, on his own, to discharge such a duty, independently of any known assignments of “shares” and special responsibilities … part of the reason why I don’t have a duty to maximize the harm preventing I can achieve on my own is that society collectively has preempted that duty and reassigned it in fair shares to private individuals. Collectively there is hardly any limit to how far we are prepared to go to prevent serious harms to individuals … positive duties to rescue are every bit as serious and weighty as negative duties not to harm. Unlike the latter, however, they must be divided into part, allocated in shares, and (often) executed by appropriate specialists.\(^5\)

According to Feinberg, the purpose of the duty to act in cases of omission is not to solve the issue of liberty or to bridge the moral divide between act and omission. Rather, the duty to act is a solution to the coordination problem. The duty to act provides lawmakers with a more logical and reasonable tool for allocation of responsibility among people, in order to prevent inefficiency and injustice. Efficiency is why parents, not others, are charged with protecting their own children from potential harm. This is also why expert firefighters, not the general population, are charged with putting out fires. In certain cases, imposing a specific duty on particular private individuals is more efficient, and sometimes more correct, than imposing a general duty to prevent harm.

B. Legal Definition

It seems that Feinberg’s definition of act and omission is rooted in the principle of bodily movement. An act is defined as a bodily movement, while omission is defined as the lack of such

\(^4\) Feinberg, supra note 29, at 171. Indeed, it appears that according to Feinberg, if a person were obligated to rescue under a Good Samaritan law, such a person could be convicted of killing. “I am therefore unimpressed with the 'moral significance claim.' Where minimal effort is required of a Samaritan there seems to be no morally significant difference between his allowing an imperiled person to suffer severe harm and his causing that harm by direct action, other things (intention, motive) being the same.”

\(^5\) Id.
a movement. His reasoning comes from the rationale of coordination. Wasted resources are a direct result of the lawmaker requiring the private individual to move his body and commit an act. In such a case, a categorical requirement to rescue others regardless of circumstance can lead to huge wasted resources since everyone will be obligated to leave their jobs in order to save people all the time. However, Feinberg sees no coordination problem, and thus takes no issue, with obligating individuals to remain passive in certain situations.

C. Criticism

Feinberg’s position is problematic for three reasons:

First, as noted regarding the liberty theory, it is difficult to assume that the entire difference between act and omission, with respect to all types of crimes, including those relating to protected interests of truly paramount significance, is based on a pragmatic-legal distinction.

Second, we may conclude from Feinberg that a private individual (who does not hold a public position) is obligated to act only in sudden or unforeseen situations. A private individual is not obligated to offer assistance when the need for such assistance is predictable since that is the role of the civil servants.

What, however, is the rule when the appointed rescuer is negligent and does not fulfill his role? According to Feinberg, in such a situation, at least theoretically, the private individual would still not be obligated to act since the duty lies with the appointed civil servant, irrespective of his diligence or negligence in such regard. However, if there is no moral difference between act and omission, as Feinberg claims, it is difficult to assume that even in such a case the private individual would not be under any kind of obligation to act.

Third, if the definition of act and omission is rooted in bodily movement, it seems that in some cases this definition would contradict legal reason. For example, the “freezing to death” or “movement” scenarios (mentioned in the critique of the liberty theory) should be categorized as omission, even though they involve bodily movement. According to Feinberg, however, they are classified as act.

5. The Effect on Personal Autonomy Theory

A. The Rationale

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46 Feinberg does not address certain problematic scenarios involving bodily movement that should be classified as omissions and thus require the identification of a duty to act. However, from his proposed rationale for a criminal law distinction between act and omission, and from his description of omission (that is often accompanied by the term inaction), it appears (and I say this with the utmost caution) that his definition is subject to the bodily movement test. Id. at 159 and at 172-73.

47 Id. at 170.
In this chapter, I present a new theory for distinguishing between act and omission in result crimes, with a focus on the difference between killing and letting die. I do not think that this rationale is the only way to distinguish between act and omission, and between killing and letting die, but I believe that it helps to fundamentally explain this distinction from a criminal law perspective. After presenting the theory, I will introduce a potential critique of the theory and what I hope is a convincing rebuttal to that critique.

I propose that the distinction between killing and letting die is rooted in the different values that lie at the core of each prohibition. The underlying premise of the theories presented above is that the interests and values behind the prohibitions are similar. The assumption is that in drowning Joe and in not rescuing Joe, John is disregarding the same core value, Joe’s life. I suggest that this assumption is incorrect. The values at the root of the prohibition against killing are broader and more substantial than those at the root of the prohibition against letting die, and this is what distinguishes the two prohibitions.

In order to examine the interests and values at the core of these prohibitions, we must ask two preliminary questions:

1. What would happen if the prohibition against killing did not exist?
2. What would happen if there were a prohibition against killing (and it were enforced) but there were no prohibition against letting die?

The answers to these two questions can clarify what the reality would be without each prohibition, providing us deeper insight into the purpose of each.

It is likely that without a prohibition against killing, we would be forced to live our lives in constant fear of life-threatening dangers. This fear would cause a significant loss of our basic sense of security, which in turn would lead to a real loss of personal autonomy. People would then be hard-pressed to maximize their personal development as fear would force them to be constantly on the defensive.

In this context, Hobbes’ words regarding the natural condition are particularly relevant:

And from this diffidence of one another, there is no way for any man to secure himself, so reasonable, as Anticipation; that is, by force, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him …

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the
fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.  

According to Hobbes, a reality in which any person is permitted to kill any other person is untenable. There is no humaneness, no culture, no creativity, and, worst of all, a person is forced to live in constant fear of death.

It is important to note, in this regard, that this theory does not require that everyone would try to kill everyone else. Even if only part of the population tried to kill another part, every person would still live in constant fear of being killed. Furthermore, even if we are not sure whether people would actually try and kill each other or not, the element of fear itself (drawn from the knowledge that there is no prohibition against killing) would significantly infringe upon people’s personal autonomy.

Robert Nozick describes a society lacking laws prohibiting killing, assault, rape, etc. in the following manner:

A system that allowed assaults to take place ... would lead to apprehensive people, afraid of assault, sudden attack, and harm ... to avoid such general apprehension and fear, these acts are prohibited and made punishable.

However, the absence of a prohibition against letting die would not lead to the same apprehension. Such a reality may not be optimal, but people certainly would not all be living in constant fear of death (or violence). Human culture would still exist. People would have to beware of dangerous situations, but this is more of an individual concern than a societal one -- people would have to take individual responsibility and not place themselves in situations of undue risk.

The differences in the answers to the two questions highlight the differences in the values at the core of each prohibition. The purpose of the prohibition against killing is to protect interests and values much more basic and critical to social norms than the prohibition against letting die. The purpose of the prohibition against killing is to allow individuals to live purposeful lives and maintain personal autonomy without being constantly afraid of losing this ability. When viewed this way, the prohibition against killing is one of the most basic elements of personal autonomy.

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On the other hand, although the prohibition against letting die may serve to enhance personal autonomy, it is not fundamental to it.\textsuperscript{51}

The distinction between killing and letting die is just one example (though perhaps the primary one) of the general difference between creating harm and allowing it. For example, an injurious act is a more serious transgression than causing injury by omission since the prohibition against actively causing injury is a more significant safeguard of personal autonomy than the prohibition against causing injury by omission. Similarly, actively causing damage to personal property creates a greater loss of personal autonomy than causing damage by omission.

The personal autonomy theory is distinct from the other theories described in this article in that it does not consider causality or risk creation. To me it is axiomatic that both act and omission involve a process of cause and effect and that the individual’s control, or supposed lack thereof, over the prohibited situation does have any real moral significance. Additionally, as opposed to the liberty theory that posits that omission causes greater loss of liberty than killing, and that loss of liberty is the sole difference between act and omission, my approach is not predicated on the relative “cost” of the prohibitions, but rather on their underlying core values. The personal autonomy theory is clearly also distinct from the coordination problem theory as the latter does not suggest any moral distinction between killing and letting die.

One question that arises according to the personal autonomy theory is that not every killing is the same as not every act of manslaughter has the same detrimental effect on our sense of personal security. Nevertheless, even if this is true, killing is still more severe than letting die as the severity of the act is measured against the severity of the prohibition, and the severity of the prohibition is measured against the interests that it is intended to protect.

As I will demonstrate presently, my approach can be founded on either of the moral theories of rule utilitarianism and social contract.

(1) Rule Utilitarianism

The theory of moral utilitarianism has two schools, rule utilitarianism and act utilitarianism. Act utilitarianism defines an act as moral if it brings about the most beneficial result under the relevant circumstances. Any other result is considered immoral.\textsuperscript{52}

Rule utilitarianism, however, defines an act as moral if follows a set of rules that, if accepted by all (or almost all) of society, would result in the most beneficial outcome. An act that does not follow such a set of rules is considered immoral.\textsuperscript{53}

\textsuperscript{51} In this context, it is important to note that although the prohibition against letting die does enhance personal and societal autonomy in some respects, as people know that when necessary they will be rescued, in other respects it actually limits such autonomy since it forces people to be prepared to perform an act of rescue at any given time.

\textsuperscript{52} John Stuart Mill, Utilitarianism 6 (J.M. Dent & Sons Ltd. ed., 1972). See also J.J.C. Smart and Bernard Williams, Utilitarianism: For and Against 9 (1973).
The primary distinction between rule and act utilitarianism is that act utilitarianism measures an action’s moral value directly, whereas rule utilitarianism measures the action’s moral value in relation to a set of rules. Act utilitarianism prohibits theft since stealing is less beneficial than not stealing. Rule utilitarianism, on the other hand, prohibits theft since it is contradictory to the rule “thou shalt not steal,” and general acceptance of this rule would produce more beneficial results than if it were not accepted.

Rule utilitarianism may provide a solution to the difficulty presented by the fact that killing does not always result in loss of individual autonomy. Rule utilitarianism defines the ideal system of rules as the one whose acceptance by society would be the most beneficial. However, there appears to be a hierarchy even within this system. A rule that protects society’s basic interests carries more weight, and its violation produces a greater level of guilt than a rule that protects lesser interests. As the prohibition against killing protects interests that are more fundamental, it is a more important and morally significant rule than the prohibition against letting die. These prohibitions must be assessed by considering the rule whose acceptance would prove most beneficial to society. Because the rule prohibiting killing is more severe than the one against letting die, killing is considered more severe than letting die, regardless of the results of the act itself.

(2) Social Contract

According to the theory of social contract, an act is defined as moral if people would agree to it in the context of a hypothetical contract.

The social contract theory, in turn, can be divided into two schools, the Hobbesian and the Rawlsian. The personal autonomy theory is consistent with both schools.

(A) The Hobbesian Social Contract

According to the Hobbesian social contract, interpersonal moral obligations are conventions. The rationale behind these conventions is rooted in the willingness of individuals to contractually accept certain moral limitations upon themselves in order to maximize their personal benefit. According to Hobbes, the prohibition against harming another’s physical being does not stem from natural law, but rather from a social contract. Most proponents of the social contract theory

\[\text{BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY 32 (2000).}\]

\[\text{Therefore, there are those who label act utilitarianism “direct utilitarianism” and rule utilitarianism “indirect utilitarianism.” See Brad Hooker, Rule Consequentialism, 99 Mind 67 (1990).}\]

\[\text{Ronald Dworkin argued against Rawls’ social contract theory that it is founded on a hypothetical contract that is not really a contract at all. Ronald Dworkin, The Original Position, 40 U. CHI. L. REV. 501 (1973).}\]

point out that the social contract is a hypothetical one, whose purpose is to validate interpersonal moral obligations.\textsuperscript{57}

According to Gauthier, the Hobbesian social contract theory rests on three principal assumptions.\textsuperscript{58} First, the world is void of moral facts. In other words, there are no natural duties that require a person to perform or not to perform specific acts. Second, man is a rational being as his actions are determined by his goals. Third, a person’s goals are founded on self-interest; i.e., a person strives above all else to promote his own interests and to benefit himself, with his primary endeavor being to protect his own life, both out of fear of death and to allow him to achieve his goals.

The question arising from this theory is: If there are no natural duties that obligate us, and man’s goal is to promote his own interests, then why do we limit ourselves from doing certain things?

In order to answer this question, Hobbes engaged in an intellectual exercise in which he asked how the world would look without central government that required and prohibited certain acts. The absence of government is what Hobbes called the “natural condition of man.”\textsuperscript{59} Hobbes claimed that the natural condition would lead to total war in which every man is enemy to everyone else. In this state, people would be in constant competition because of (among other things) the world’s limited resources. Even if man were willing to settle for his own share, he could not be certain that his fellow would make the same compromise. Therefore, everyone would live in constant fear of being killed, a condition that would lead to widespread killing as people would prefer to kill rather than be killed. This would produce war of all against all.\textsuperscript{60}

Because the natural state of man involves all-out war, man, as a rational being who strives to create his own benefit, is inclined to escape this condition. This entails creating a contract through which each individual limits himself from certain behavior that could restore the natural state. The contract’s existence would benefit each individual’s personal state immeasurably.

As the basis for the social contract is man’s escape from his natural condition, the first and primary undertaking in the contract would be not to kill.\textsuperscript{61} Although a rule requiring rescue

\textsuperscript{57} David Gauthier, \textit{The Social Contract as Ideology}, 6 PPA 130, 135 (1977). Nevertheless, there are those who view moral norms as the product of a real contract between individuals. See, for example, Gilbert Herman, \textit{Explaining Value: And Other Essays In Moral Philosophy} 66-68 (2000). For more on Hobbes’ approach, see also Jean Hampton, \textit{Hobbes And The Social Contract Tradition} (1986).


\textsuperscript{59} Hobbes, supra note 48, at 105.

\textsuperscript{60} Id. at 95.

\textsuperscript{61} Hobbes, too, pointed out that the basic rule in the contract is to strive for peace, and, assuming that this rule is generally accepted, what follows is a general prohibition against killing. “That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.” \textit{Id.} at 100.
would likely also be included, it would probably be less concrete and have less impact as it is not fundamental to the survival of society.

**(B) The Rawlsian Social Contract**

In his book “A Theory of Justice,” Rawls presents a theory that purports to serve as a basis for the building blocks of national government.\(^6^2\) Rawls assumes that in each society there are shared and conflicting interests. Shared interests stem from the realization that cooperation is preferable to each individual acting alone. Conflicting interests are rooted in each individual’s concern with the societal distribution of rights and obligations.\(^6^3\) For this reason, says Rawls, it is necessary to create several principles to allow for the just distribution of rights and obligations among individuals as well as the proper distribution of resources.

Rawls uses the social contract to discover and justify the principles that serve society’s basic institutions.\(^6^4\) These are the fundamental principles for distribution of rights, obligations and resources among the members of society that free and rational people, concerned with furthering their own interests, would accept in an initial position of equality, or the original position.\(^6^5\) Rawls emphasizes that his is not a real contract between particular people, but rather an intellectual exercise designed to determine which principles would be accepted by people in the original position.\(^6^6\) People who are in the “initial position of equality” do not know their social position and financial status. They do not know if they are sharp or obtuse, rich or poor, and so forth.\(^6^7\) In a situation in which an individual does not know his true position, there is complete equality. This is why Rawls theorizes that laws that are created in the original position are fair.\(^6^8\)

Rawls suggests that people in the original position would agree on two principles.\(^6^9\)

1. Each person is to have an equal right to the most extensive scheme of basic liberties.

2. Social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone’s advantage, including society’s weakest elements.

Rawls states that the first principle takes priority over the second as the economic advantage does not justify loss of liberty. Liberties can only be compromised when they conflict with other liberties.\(^7^0\) The liberties that Rawls discusses are political liberty (the right to vote and to hold

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\(^6^3\) *Id.* at 4.

\(^6^4\) *Id.* at 10.

\(^6^5\) *Id.*

\(^6^6\) *Id.* at 11, 14.

\(^6^7\) **RAWLS, supra** note 62, at 11, 14.

\(^6^8\) *Id.* at 17.

\(^6^9\) *Id.* at 53.

\(^7^0\) *Id.* at 53-54. For a critique of this position, see H.L.A Hart, *Rawls on Liberty and Priority*, 40 U. CHI. L. REV. 534-55 (1973).
public office); freedom of speech and assembly; liberty of conscience and freedom of thought; and freedom of the person, which includes freedom from psychological oppression, physical assault and dismemberment.\textsuperscript{71}

I propose that Rawls’ idea that people in the original position would agree to these principles relates to the distinction between killing and letting die. As already discussed, the prohibition against killing prevents the individual’s life from being wrought with fear. This fear can be translated into a general loss of Rawls’ basic liberties. There is no political liberty, no freedom of speech, no freedom of thought and obviously no freedom from psychological oppression and physical assault. It is clear, then, that in order to preserve these liberties, individuals in the original position would agree to the prohibition against killing.

Nickel makes a similar argument, highlighting the following:

> Creating an effective system of protections of security rights through the criminal law is one of the most important things that can be done to make possible the enjoyment of other liberty below. If those who would invade people’s liberties and rights are unrestrained in their ability to threaten death, harm, violence, and loss of property, few if any liberties can be enjoyed. Security rights, like due process rights, are essential building blocks for a system of liberty.\textsuperscript{72}

However, preservation of these liberties is not dependent on a rule obligating rescue of others from danger. Such a rule has no bearing on political liberty, freedom of speech, freedom of thought and freedom from psychological oppression and physical assault.

I am not suggesting that people in the original position would not agree to a rule requiring rescue in certain situations, only that even if accepted, such a rule would be much more limited and minor than the prohibition against killing.

Rawls himself suggests that people in the original position would agree to a rule requiring rescue as it would improve people’s quality of life even absent the need for actual assistance. Rawls emphasized that the real value in such a rule is not in the actual assistance but in the security that comes with knowing that such assistance would be made available.

> A sufficient ground for adopting this duty is its pervasive effect on the quality of everyday life the public knowledge that we are living in a society in which we can depend upon others to come to our assistance in difficult circumstances is itself of great value … the primary value of the principle is not measured by the help we

\textsuperscript{71} RAWLS, supra note 62, at 53.

\textsuperscript{72} James W. Nickel, Rethinking Rawls’s Theory of Liberty and Rights, 69 CHI.-KENT. L. REV. 763, 768 (1994).
actually receive but rather by the sense of confidence and trust in other men’s
good intentions and the knowledge that they are there if we need them.\textsuperscript{73}

Rawls’ argument in favor of a duty to rescue can assist us in better understanding the prohibition
against killing. Everyone would agree to the prohibition against killing as it has great effect on
our quality of life. The knowledge that no one will harm us is very valuable. Imagine society in
general, and each individual in particular, without such a prohibition. People would live in
constant fear without the ability to do anything to alleviate it.

Let us return to the difficulty of different types of killings. Some killings do not infringe upon the
prohibition’s protected interests; thus, perhaps not every killing is truly different from a letting
die. The solution, according to the social contract theory, is that we do not examine each specific
case. The severity of the act must be assessed based on the principle that would have been agreed
to in the social contract. According to Hobbes, this would be the contract that would be agreed to
while man was in his natural state, while according to Rawls this would be the contract agreed to
in the original position of equality. According to both theories, the basic principle that would be
generally accepted is the prohibition against killing, and not the rule requiring rescue as the
interests protected by the former are broader and weightier than those protected by the latter.

The duty to act in omission, then, does not mitigate the loss of liberty or replace the need for
direct cause and effect, but rather it rectifies the omission’s relative moral inferiority. This moral
inferiority is reflected in the distinctive core values that are at the root of the prohibitions against
killing and letting die.

Nonetheless, a person may experience a significant loss of personal autonomy if she knows that
in certain situations she will not receive assistance. There are times when an individual becomes
embroiled in a dangerous situation through no fault of her own, such as in cases of illness or
natural disaster. Loss of autonomy may also result from the person withdrawing from certain
activities out of fear that she will not receive assistance when needed. This is why society
appoints certain “agents” whose responsibility it is to provide security to those who are in
harmful situations. These agents are charged with providing stability and security: doctors to
treat illness, lifeguards to prevent drowning, parents to monitor children, etc. These agents
provide a vital service as they allow society and its members to realize their autonomy.

If we were to do away with the duty to rescue, even with respect to agents such as police, parents
or doctors, personal autonomy would be greatly compromised by the realization that certain
things are completely out of our control. This could have the effect of severely hindering societal
development. The breach of this duty, then, can sometimes approximate the loss of autonomy
caused by an act.

\textsuperscript{73} \textit{Rawls, supra} note 62, at 297-98.
B. Criticism of the Personal Autonomy Theory

The personal autonomy theory appears to be based on the assumption that the prohibition against killing prevents people from killing each other, thus preventing fear and the loss of personal autonomy that is a by-product of this fear. This assumption, however, is not indisputable as the opposite may also be true. Why not assume that human nature is inherently good and that the majority of people would not try to kill each other? If this were the case, then even without the prohibition against killing, people would not experience the fear that leads to loss of personal autonomy.

Even if we do not approach Hobbes’ extreme natural condition of war of all against all, it is likely that at minimum there will be certain people who will belligerently toward others. This likelihood creates loss of a basic sense of security and personal autonomy. Furthermore, even if no one actually exercises the ability to attack others, it is likely that the uncertainty regarding personal safety will create a general sense of fear. The prohibition against killing mitigates the likelihood of attack by another and thus, at least theoretically, also decreases the fear of such an attack. Fear does not only stem from actuality, but also from the possibility of such an actuality. In this way, the prohibition against killing represents a safeguard of a basic element of our normal existence.

Moreover, irrespective of the dispute regarding basic human nature and what would happen without a prohibition against killing, lawmakers are charged with taking a more conservative approach and must assume the worst. Assuming otherwise would be foolish as the risks in taking a more lenient approach are very high. Therefore, even though it may be unclear what exactly the result would be of not having a prohibition against killing, it is reasonable to assume that certain motivations (hatred, personal gain, survival, etc.) would push people to try and kill each other.

C. Loss of Personal Autonomy – Legal Definition

Just as with the previous theories, the definition of act and omission must reflect the rationale of the theory of loss of personal autonomy. Therefore, killing must be defined such that the relevant prohibition enables life without fear. Letting die, on the other hand, must be defined such that the relevant prohibition reflects the values of assistance and broad personal autonomy. In my opinion, in order to provide for a basic sense of security without fear, the prohibition against killing must cover intrusion into the individual’s protected space. Intrusion into the life of another is caused largely by the creation of a risk or removal of certain defenses relating to the victim. The definition of killing, then, is sometimes also connected to the question of ownership - i.e., who is the owner of the defense that was removed. The general concept is to create a protected space, a secure area that may not be intruded upon. If a person dies as a result of such an intrusion, it would be classified as a killing. We would not require, then, the identification of a duty to act in order to convict the defendant. However, if a person dies other than as a result of
an intrusion into her protected space, the event would be classified as a letting die. There are, therefore, certain situations that involve bodily movement that are not considered killing as the movement did not breach a protected space, while there are other situations that do not involve bodily movement but are still considered killing as they do involve such a breach.

In this context, ownership of the defense is not a matter of a right to personal property as an ideal in and of itself. Removal of a defense belonging to the victim should not be classified as a killing because of the loss of personal property. Rather, it is the fact that individuals protect themselves largely via their bodies and property that causes removal of a defense belonging to the victim to infringe upon the interests that are at the immediate root of the prohibition against killing.  

(1) The Implications of Ownership of the Defense

Who owns the defense: the agent or the victim?

A basic assumption is that when the agent creates the risk, the act is classified as a killing. By drowning Joe in the sea, John caused Joe’s death and therefore John’s act is a killing. This scenario involves a breach of the individual’s protected space by directly harming his person. On the other hand, when John sees Joe drowning and does not jump to his rescue, John did not create the risk and breach Joe’s protected space (even if he had a direct causal effect on Joe’s death), and therefore John’s conduct is a letting die.

Nevertheless, the issue of the removal of the defense, along with its ownership, bears further analysis.

The following two scenarios will help clarify my approach:

(A) **Mid-ocean escape**: John is about to die at sea. Suddenly, he notices Joe standing on the deck of his boat, watching. John swims over to the boat in order to save himself. Joe is not interested in saving John and sails the boat away. John dies.

(B) **Movement**: John shoots at Joe, and Joe dodges the bullet. The bullet hits Jane and kills her (for the sake of this argument, we assume that Joe was wearing body armor and would not have been injured anyway).

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74 The context in which ownership is used here is independent of the libertarian concept of property as sovereignty. Libertarianism demands that personal property be preserved in order to maximize negative liberty, which in turn is required for “human flourishing.” In addition, my ideas here do not depend on the notion of property as defining the individual, as part of the “I.” Ownership here is relevant because it serves to protect the protected space from intrusion. Such protection is needed not against tyrannical government, but against other individuals. According to my theory, the protected space allows people to live without fear in order to carry on their normal lives. For more on theories of ownership, see HANOCH DAGAN, KINYAN AL PARASHAT DERACHIM 26, 38-39 (2005).

75 Obviously, that creation of the risk may not be directly connected to the individual’s physical person. For example, planting a bomb that causes mass death. Nonetheless, even a scenario such as this involves intrusion into the individual’s protected space, even if the person who planted the bomb did so in his own home.

76 For a parallel scenario, see above p. 8.
According to the personal autonomy theory, neither scenario is a killing, even though both involve bodily movement. This is because in both scenarios Joe removed a defense that belonged to him and not to the victim. In the first scenario, Joe moved his boat, which itself served as a defense against John’s death. Similarly, in the second scenario Joe moved his own body, which at the time served as a defense against the airborne bullet.

A slight modification of the scenarios will hone the moral significance of this point:

(C) Mid-ocean escape 1: Joe stands on John’s boat and pilots the boat to shore. John dies.

(D) Movement 1: Joe places Jane so that she will be hit by John’s bullet.

The latter two scenarios should be classified as killings as here he killed them by preventing them from utilizing their own defenses.

The difference between scenarios A and B as opposed to C and D is ownership of the defense. In scenarios A and B, the defense belongs to the agent, while in scenarios C and D it belongs to the victim. Ownership of the defense is not a mere technicality. Removing a defense that belongs to the agent is not considered a breach of the victim’s protected space, while removing a defense that belongs to the victim is. Intruding on this space means loss of personal and social autonomy and merits a more severe conviction.  

It is possible to demonstrate certain cases in which the agent damaged or removed a resource that belonged to the victim, causing the victim to die, and yet the agent is still not guilty of manslaughter. This, however, would be due to lack of legal causation. In such cases, the defense’s removal is critical to the end result, but the agent is not convicted of manslaughter because of his circumstantial distance from the actual harm. Imagine a case in which A steals money from certain people who had intended to donate it to the hospital in order to purchase drugs and life support machines. The theft prevented the donation and several patients died as a result. It is possible that A would not be convicted of manslaughter because of lack of legal

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77 This scenario also appears with respect to the liberty theory, above p. 8.

78 Because the loss of personal autonomy theory is based on the concept that an individual’s person and resources create a protected space in which he can live in basic security, it follows that we should distinguish between resources that define a protected space and those that do not. Based on this distinction, there may be times where the agent removes a protective defense belonging to him, and the case would still be classified as killing. For example: A jumps from the roof of a building, with the knowledge that B has a safety net spread at the bottom of the building that will save A if he falls directly on it. B moves the net, and A dies. In this case, even though the net belongs to B, we may not require a duty to act in order to convict B of killing. This is because it is possible that not every resource belonging to the agent defines his own protected space. Under these particular circumstances, it is possible that the net does not define the individual’s personal protected space, and therefore its removal constitutes killing. On the other hand, a person’s house does constitute his personal protected space, and therefore A locking his own door so that B freezes to death outside would be classified as letting die and require a duty to act for a conviction. In other words, a hypothetical social contract defines when certain resources constitute personal protected space in order to ensure life without fear. There are resources that will always be considered protected space (such as a person’s home) and there are others that will constitute such a space only in specific cases (such as the net).
causation as a result of circumstantial distance from the effect. The distinction between removing a defense belonging to the victim and removing one that belongs to the agent is valid only in cases where we can identify legal cause and effect.

**When the defense belongs to a third party, or to no one at all**

What is the rule when the defense does not belong to the agent or to the victim, but to a third party or to no one at all? Will the agent’s removal of the defense be classified as a killing or as a letting die? Will we require a duty to act?

When the defense belongs to a third party, we must distinguish between whether the third party allowed the victim to use the defense or not. If the defense was at the victim’s disposal, it is tantamount to actually belonging to the victim, and the agent’s act would be classified as a killing. If Joe disconnects John from a hospital-owned ventilator, Joe’s act would be classified as a killing since he removed a defense that was provided to John by the hospital. However, if the third-party owner did not grant the victim use of the defense, the situation becomes somewhat ambiguous. How would we classify a case in which Joe pilots Bill’s boat to shore, while leaving John to drown?

The answer apparently lies in the agent’s need for the defense. The greater the agent’s need for the defense, the less his act is considered a killing. When the victim’s need for the defense is greater than the agent’s, the victim has a “need right” to the defense. Removal of the defense in such a case would constitute a breach of the victim’s protected space. However, when both the agent and the victim have an acute need for the defense, they would both qualify as having a “need right.” In such a case, both parties have an equal claim to the defense and there is no breach of protected space (since both parties have equal rights to the defense, there is no protected space to begin with).

The scenario in which the defense does not belong to anyone appears more complicated. For example, how would we classify a case in which the agent pilots away a boat that does not belong to anyone? On the one hand, perhaps the answer here too depends on each party’s need for the defense. However, intuitively we may also suggest that the answer here is different. Imagine the following scenario:

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79 The term is coined by Kai Draper in *Rights and the Doctrine of Doing and Allowing*, 33 PPA 253, 271 (2005). Draper himself uses the term to suggest that even if the defense belongs to the agent, when the victim has a “need right” the defense’s removal would be considered killing.

80 Draper suggests a scenario in which both parties have equal rights to the defense. Two people are on a sinking ship, but there is only one life vest that belongs to neither one of them. Each party obviously has a right to use the life vest and if one had been holding it, he would not be considered the other party’s killer. However, if neither party was holding the vest and one party reached it before the other, the taking of the vest from the one who reached it first, would be considered an act of killing. Draper *supra* note 79, at 274.
**Death from disease:** John will die from a certain disease unless he undergoes a particular, and extremely expensive, medical procedure. John, much to his delight, becomes aware of a treasure hidden outside his house that will allow him to finance his procedure. Joe also becomes aware of the treasure and runs to dig it up before John can get to it. Joe then proceeds to spend the treasure on his own needs. As a result, John does not have the procedure and dies.

In this scenario, both parties have equal rights to the treasure, though John has the greater need. Nevertheless, Joe’s act should still be classified as a letting die. In order to convict Joe of manslaughter or murder we would need to identify a duty to act, i.e. a specific duty obligating Joe to rescue John. However, if John had been the owner of the treasure, then Joe’s act would be classified as a killing and he could be convicted of manslaughter or murder regardless of the existence of a duty to act. 81

Thus, one can distinguish between situations in which the defense belongs to a third party and the defense is ownerless. When the defense belongs to a third party, classifying the act depends on the “need right” of the agent and the victim. However, when the defense does not belong to anyone, the classification is independent of “need right.”

This distinction between killing and letting die based on the question of ownership of the defense is supported by several authors.

McMahan, for example, writes that:

> The idea that the provider's aid must be in some sense continuing in order for his withdrawing it to count as letting die does not imply that any further action is required from him on the dependent person's behalf. That is, one may let a person die even if there is nothing that one must do in order for the person to survive. **As long as the dependent person's continued survival depends on resources that properly belong to the provider (where "resources" are understood liberally to include action, physical possessions, political power, and so on), it can be appropriate to see the dependent person as being kept alive by the provider. So that the withdrawal of the life sustaining resources by the provider will count as an instance of letting die.** 82

This appears to be Frances Kamm’s approach as well:

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81 I think it important to reiterate here that the emphasis is not on ownership. I am not suggesting that the treasure belonging to John makes the case a more severe one. I am proposing that in the framework of a social contract, we would agree that these rules are necessary to allow for life without fear. Such a contract would initially prohibit acts of killing that are brought about by harming our person or property. After that, the contract would prohibit acts of killing brought about by causing loss of third-party resources (such as removing a defense belonging to a third party). Only then would the contract prohibit letting die, meaning not providing assistance or removing a defense belonging to the agent himself.

82 **MCMAHAN, supra** note 37, at 381. The emphasis is mine.
Essentially, removing a defense against a potential cause of death – this could be a cause that had at one time already threatened the person or something entirely new – is a killing if the person who dies was not dependent for the defense on the person who terminates it. If an agent terminates aid and so allows a potential cause of death actually to kill someone, but it is aid that the agent himself was providing, or aid that belongs to the agent, then we have a letting die (this disjunctive set of conditions is meant to include cases in which A takes what is B’s to help C, and B then removes it).\(^{83}\)

Both McMahan and Kamm note the relevance of ownership of the defense. When the defense belongs to the agent, its removal is a killing. When the defense belongs to the victim, its removal is a letting die.

(2) **Separating Conjoined Twins – Act or Omission?**

The personal autonomy theory is reinforced by a UK ruling regarding the separation of conjoined twins. Jodie and Mary were born conjoined twins. Each girl had her own brain, heart, kidneys, arms, legs and other organs. However, Mary’s heart and liver received blood and oxygen from Jodie. Without Jodie, Mary would have died at birth.

The case presented to the court was as follows. If the girls were not separated they would both die within several months as Jodie’s heart was not strong enough to support both of them. If the girls were separated, Jodie would survive and Mary would die immediately. The twins’ parents could not agree to the procedure as it would mean killing one girl to save the other.

During the hearing, the question was posed as to whether separating the twins would be tantamount to murdering Mary. Among other issues, the court debated whether separating the twins was considered act or omission. Some suggested that separation was equivalent to removing life support (as Jodie provided Mary with blood and oxygen), and thus, according to the Bland precedent, considered omission.\(^{84}\)

The court, however, did not accept this comparison. This was because separating the twins required an invasion of Mary’s body and not just treatment of Jodie’s organs. The invasion of Mary’s body turned the instance to act as opposed to omission.

7.7 Act or omission in this case?

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\(^{83}\) F.M. Kamm, Morality, Mortality: Rights, Duties, and Status 28-29 (1996). The emphasis is mine. Although it is unclear according to McMahan and Kamm what the ruling would be when the agent placed a defense belonging to the victim and subsequently removed it, it is clear that the definition of killing and letting die is based, at least somewhat, on ownership of the defense.

I set out earlier (I realise with embarrassment a lot earlier) how this operation would be performed. The first step is to take the scalpel and cut the skin. If it is theoretically possible to cut precisely down the mid-line separating two individual bodies, that is not surgically feasible. Then the doctors have to ascertain which of the organs belong to each child. That is impossible to do without invading Mary's body in the course of that exploration. There follow further acts of separation culminating in the clamping and then severing of the artery. Whether or not the final step is taken within Jodie's body so that Jodie's aorta and not Mary's aorta is assaulted, it seems to me to be utterly fanciful to classify this invasive treatment as an omission in contra-distinction to an act. Johnson J.'s valiant and wholly understandable attempt to do so cannot be supported and although Mr. Whitfield Q.C. did his best, he recognised his difficulty. The operation has, therefore, to be seen as an act of invasion of Mary's bodily integrity and unless consent or approval is given for it, it constitutes an unlawful assault upon her.85

In other words, the court explained that it was not a case of omission, not because it involved a bodily movement, but rather because the procedure required an invasion of Mary’s body. An invasion of bodily integrity cannot be classified as omission. From the ruling it appears that if it had been possible to separate the twins solely by operating on Jodie’s body, then the scenario would have been defined as omission. However, because the procedure involved an invasion of Mary’s body it must be defined as act.

**Conclusion**

This article presents the various rationales for the criminal law distinction between act and omission and the legal definitions that arise out of these rationales. This is not a clear-cut issue, particularly in light of the moral theories that do not accept this distinction at all. I critique these approaches and suggest a new theory to explain the distinction, focusing on the distinction between killing and letting die. According to my theory of personal autonomy, the distinction between killing and letting die is rooted in the differing interests that form the basis for the two prohibitions. An intellectual exercise, comprised of the following two questions, helps to demonstrate these different interests: what would happen if there were no prohibition against

85 Re A (children) (conjoined twins: surgical separation) [2000] 4 All Er 961, 1003. The emphasis is mine.
killing, and what would happen if there were a prohibition against killing but not against letting die?

In answer to the first question, I suggest that without a prohibition against killing, it is likely that people would live in fear, without a basic sense of security. This fear would cause a loss of personal autonomy, regardless of whether it was realized or not. However, personal autonomy would not be compromised (or minimally so) absent the existence of a prohibition against letting die. I demonstrate how this approach conforms to the theory of rule utilitarianism as well as to the Hobbesian and Rawlsian theories of social contract. Finally, I present a new definition for killing and letting die, one that is independent of the agent’s bodily movement, thus requiring a new logic behind the need for a duty to act in omissions.

This article deals primarily with the distinction between act and omission in result crimes. This issue raises the question of whether it is appropriate to make a broad distinction between result crimes and conduct crimes regarding the necessity to identify a duty to act in crimes of omission. In light of the rationales I present here, it is possible that only result crimes require the identification of such a duty. It is, therefore, imperative to carefully consider whether conviction is always dependent on the identification of a duty to act in every conduct crime committed by omission. This question, however, is best left for a future article.